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April 19, 2004

Adam P. Schwend
Associate Producer, KXL Radio
Rose City Radio, Corp.
0234 SW Bancroft
Portland, OR 97201-4237

Jollee Faber Patterson
General Counsel/Board Secretary
Portland Public Schools
501 North Dixon Street
Portland, OR 97227

Re: Petition of Adam P. Schwend on behalf of The Lars Larson Show, received April 8, to disclose certain records of the Portland Public Schools

Dear Mr. Schwend and Ms. Patterson:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Adam Schwend requests the District Attorney to order the Portland Public Schools and its employees to produce a copy of the following records:

List of ALL former candidates who applied for the position of Superintendent of Portland Public Schools in the years 2003 and 2004.

Petitioner made his request for the above information in an email to Portland School Board Co-Chair Julia Brim-Edwards on April 5. General Counsel Jollee Patterson replied by email on April 7, claiming the material was exempt as personal information under ORS 192.505(2) and as confidential information under ORS 192.502(4). Ms. Patterson noted that it would be "a strong disincentive for a sitting superintendent or other non-traditional candidate to apply for the superintendency if their candidacy was public knowledge." She argued that even though the search was concluded, "revealing the names of the candidates after the fact would strongly discourage candidates from applying in future searches."

Petitioner takes the position that now that the superintendent applicants "are no longer candidates, and a choice has been made in the superintendent search, it WOULD be in the public's interest to release the list of former candidates, so the public can know who was denied and can demand reasons for why they were denied."

DISCUSSION

Personal Privacy Exemption

ORS 192.502(2) conditionally exempts:

> Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

"The purpose of this exemption is not to prevent disclosure of personal information, as such, but rather to protect privacy from unreasonable invasion." Jordan v. MVD, 308 Or 433, 441 (1989). Only personal information that would constitute an unreasonable invasion of privacy if publicly disclosed is protected under this exemption. In Jordan, 308 Or at 442, the court noted that the trial court found that the affidavit filed in the trial court

> ...sufficiently established that disclosure to the requester would more likely than not unreasonably invade her privacy because providing the information would allow Jordan to harry her incessantly to the extent that an ordinary reasonable person would deem highly offensive.

"[T]he information is not exempt absent an individualized justification for exemption." Attorney General's Public Records Manual, 2004, p. 61. This determination must be made on a case-by-case basis. A blanket policy of nondisclosure is not enforceable. Guard Publishing v. Lane County School Dist, 310 Or 32, 38-40 (1990).

Personal information is not defined in the exemption. In Jordan v. MVD, supra at 441, the Supreme Court cited Webster's Third New International Dictionary definition of "personal" as meaning "1. of or relating to a particular person: affecting one individual or each of many individuals: peculiar or proper to private concerns: not public or general***(personal baggage):***6: exclusively for a given individual (a personal letter)***."

In Guard Publishing Co. v. Lane School Dist., 310 Or 32 (1990), the Supreme Court commented on the Court of Appeal's position that the test for whether information is personal under ORS 192.502(2) is "whether it normally would not be shared with strangers." The Court of Appeals had applied that test in Guard Publishing Co. v. Lane School Dist., 96 Or App 463, 467 (1981) and held that one's name is unquestionably information normally shared with strangers. In a footnote to its opinion, the Supreme Court noted:

> In Jordan v. MVD, *supra*, we implicitly rejected this Court of Appeals test. The District Court did not seek review of the lower courts' conclusion that it must disclose the replacement coaches' names. However, because we hold that the District's 1984 policy is not compatible with the disclosure statutes, we do not here decide whether a person's name could ever be exempt from disclosure under ORS 192.502(2). 310 Or at 36, n4.

The Attorney General has taken the position that "[g]enerally, disclosure of a name itself would not constitute an unreasonable invasion of privacy." Attorney General's Public Records Manual, 2004, p. 62. However, the identities of candidates for university president were not disclosed in a 1988 Letter of Advice. "[A] person's name may be exempt in certain contexts, due to a person's desire for confidentiality to avoid stigmatizing or other undesired effect." Attorney General's Public Records Manual, 2004, E-6.[1]

In a 1995 order, a CSD list of employees involved in the Whitehead case was found not exempt "because disclosure would not likely lead to harassment or physical harm of individuals named on the list." Attorney General's Public Records Manual, 2004, F-30. In a March 20, 2003 order (attached), the Attorney General denied a petition for the names of individuals giving confidential information to DMV:

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[1] "Release of the names would be contrary to the public interest since the potential for disclosure of such information may cause many or most qualified candidates to refuse to apply, making it more difficult for the state to recruit talented individuals to fill important offices."

> This office has concluded that normally, neither the name, home address nor telephone number of an individual is exempt on the basis of personal privacy because a person generally shares such information with other members of the public. However, we have also concluded that there are situations in which it can be established that such information is covered by this exemption.

It is a close question, but we agree with the Attorney General that a name, no less than a home address or telephone number, is theoretically covered by the exemption. We are mindful of the admonition in Jensen v. Schiffman, 24 Or App 11, 17 (1976) that "any privacy rights that public officials have as to the performance of their public duties must generally be subordinated to the right of the citizens to monitor what elected and appointed officials are doing on the job."

Portland Public Schools argues that a distinction should be drawn between disclosure of the names (and backgrounds) of the top two candidates and the names of unsuccessful candidates for superintendent. "The public has been made fully aware of the key choice." Ms. Patterson argues that revealing the candidate's names would "threaten the candidate's current employment." It could have "embarrassing professional impact and create potential political problems for a candidate if their boards, colleagues or parent groups were to find out that he or she had been thinking of leaving."

The purported need for discretion is supported by the unfortunate results of the "very open public process" attempted by the Portland Public School District three years ago. "Some persons refused to become candidates and all of the persons who became candidates or finalists ultimately declined the position." The "faster, less expensive, and ultimately successful" process this time was attributed to the promise by the District that the names would remain confidential.

The critical question is whether revealing the names now would be in the public interest. Weighed against petitioner's desire to evaluate the correctness of the decision of the School Board is the possibility that "revealing the names would violate the assurance of confidentiality, threaten the candidate's current employment and strongly discourage candidates from applying in future searches." Ms. Patterson cited a statistic that the tenure of the average urban superintendent is just over three years. She argues that with the small pool of potential candidates, "the District cannot afford to lose a single potential candidate over this issue." Many, if not most, potential candidates would be discouraged if not dissuaded from applying under such circumstances.

The District has the better of the argument. Disclosure of the names of unsuccessful candidates for superintendent would be an unreasonable invasion of privacy and would not be in the public interest. The names are exempt.

II. Confidential Submissions

ORS 192.502(4) exempts:

> Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

As stated in the Attorney General's Public Records and Meetings Manual, 2004, p. 68, there are "no less than five conditions that must be met" for the exemption to apply:

1. The informant must have submitted the information on the condition that the information would be kept confidential.

2. The informant must not have been required by law to provide the information.

3. The information itself must be of a nature that reasonably should be kept confidential.

4. The public body must show that it has obligated itself in *good faith* not to disclose the information.

5. Disclosure of the information must cause harm to the public interest.

On April 16, this office reviewed at length the District files with its search consultant, Liz Kaufman. We are satisfied that the first four conditions have been established. Each candidate submitted his or her candidacy in confidence.[2] The information was, of course, not required by law to be provided. It is clear personal information obtained from a candidate for as important a position as Superintendent of a large urban school district is of a nature that reasonably should be kept confidential. The District has specifically obligated itself in good faith not to disclose the information, especially the names of the candidates unless the candidate "explicitly agreed that their name could be released at the final stage."

According to the District, the harm to the public interest cannot be underestimated. Future candidate searches would be jeopardized by the realization that the District's promise of confidentiality could not be trusted.

In our opinion, the significant public interest is in attracting the best candidates for the position. Both reason and experience demonstrate that this can only be accomplished by soliciting and accepting applications under the cloak of confidentiality. Maintaining the integrity of the search process can be accomplished by disclosing the names of the finalists for public scrutiny in the final selection process. The public can evaluate the candidates and make judgments on the ultimate decision of the School Board. The exemption applies.

ORDER

Accordingly, it is ordered that the petition of Adam Schwend to disclose certain records of the Portland Public Schools is denied.

Very truly yours,

MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

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[2] Again, in the 1988 Letter of Advice, supra, the Attorney General noted that the identities of candidates for university president "may also be exempt from disclosure under ORS 192.502(3)[now (4)]" as information submitted in confidence if the potential applicants requested that their identities be kept confidential."